Does the Second Amendment Make Gun Politics Obsolete?

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In American law, the boundaries of regulation are set by—among other things—politics and the Constitution. Either one can serve as a constraint. Regulations that are politically unpopular or otherwise unfeasible are non-starters regardless of whether they satisfy the Constitution. Regulations that violate the Constitution, on the other hand, may be tremendously popular but will often be struck down by courts.

The line between these political and constitutional constraints is never entirely clear, as political rhetoric and constitutional doctrine borrow from one another in innumerable ways. Elected officials take oaths to uphold the Constitution; judges often act in ways that appear political. But in a broad sense, judges are more commonly associated with the enforcement of constitutional law and regularly deny that they are doing politics—a matter for elected officials. Recognizing some slippage between the categories,[1] we can draw a line between judge-enforced constitutional law and democratic politics.[2]

For most of American history, the balance of gun rights and regulation was set by politics—not, as one might suspect from its prominence in the current gun debate, the Second Amendment. Decisions about gun law were made by elected officials at the federal, state, and local level, responding to different forms of political pressure.[3]

1. See, e.g., Joseph Blocher, "Gun Rights Talk," *Boston University Law Review* 94 (2014): 813.
2. Adam Winkler, "Is the Second Amendment Becoming Irrelevant?" *Indiana Law Journal* 93 (2018): 253.
3. See, e.g., Kristin A. Goss, *Disarmed: The Missing Movement for Gun Control in America* (Princeton University Press, 2010); and Robert J. Spitzer, *The Politics of Gun Control*, 8th ed. (New York: Routledge, 2020).

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As with other regulatory issues, politics led to different approaches in different places.[4] And that variation was constitutionally tolerated. For more than two centuries, no federal case anywhere in the United States struck down a gun regulation on the basis that it violated the right to keep and bear arms—rather, federal courts broadly agreed that the Second Amendment applied *only* in the militia context.[5] With no constitutional obstacle to private gun regulation, such laws were determined through the normal give-and-take of the political process.

That changed with the Supreme Court's 2008 decision in *District of Columbia v. Heller*.[6] That decision—the first in which the Court ever struck down a gun law on Second Amendment grounds—found that the Amendment encompassed a right to keep and bear arms for certain private purposes such as self-defense in the home and that it was not limited to people, arms, and activities having some relationship to the organized militia. *Heller* thus announced a more significant role for courts in the gun debate—much to the consternation of those who disagreed with the majority's approach.[7]

But for more than a decade, that role nonetheless remained somewhat circumscribed—this time, much to the consternation of gun rights advocates who believed that the courts were under-protecting the right to keep and bear arms. Empirical studies of Second Amendment litigation during this period show that roughly 90% of Second Amendment challenges failed.[8] What to make of that number, however, was contested. Some saw it as evidence that the Second Amendment was being treated as a second-class right,[9] others attributed it to the fact that many Second Amendment challenges were weak to begin with,[10] or—in keeping with the theme of this Article—that politics had already done the work of Second Amendment litigation by deregulating guns to the point that there were not many restrictive gun laws left to challenge.

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4. See, e.g., Joseph Blocher, "Firearm Localism," *Yale Law Journal* 123 (2013): 82; and Eric M. Ruben and Saul Cornell, "Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context," *Yale Law Journal Forum* 125 (2015): 121.

5. Clark Neily, "*District of Columbia v. Heller:* The Second Amendment is Back, Baby," *Cato Supreme Court Review* 127 (2007): 140.

6. District of Columbia v. Heller, 554 U.S. 570 (2008).

7. *Heller*, 554 U.S. at 680 (Stevens, J., dissenting).

8. Eric Ruben and Joseph Blocher, "From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After *Heller*," *Duke Law Journal* 67 (2018): 1437 (reviewing roughly 1,000 post-*Heller* Second Amendment challenges).

9. Silvester v. Becerra, 138 U.S. 945, 952 (2018) (Thomas, J., dissenting from denial of certiorari); and George A. Mocsary, "A Close Reading of an Excellent Distant Reading of *Heller* in the Courts," *Duke Law Journal Online* 68 (2018): 43.

10. Ruben and Blocher, "From Theory to Doctrine," no. 8, 1447.

For example, as of 1987, twenty-nine states had "may issue" laws that required a person to show good or proper cause to receive a concealed carry license.[11] Another sixteen states prohibited concealed carry altogether. Only one state—Vermont—required no permit for concealed carry. By 2022, those numbers had changed radically. Only about half a dozen states had "may issue" regimes, forty-three had adopted "shall issue" rules that require a concealed carry license to be issued to anyone satisfying certain objective criteria, and twenty-five of those shall-issue states also allowed concealed carry with no permit whatsoever.[12] Notably, many of those states call the latter "constitutional carry."[13]

New York was one of the states that still maintained a "may issue" rule, which was the subject of the last Supreme Court Term's major Second Amendment case, *New York State Rifle and Pistol Association v. Bruen*.[14] The Court—in a 6–3 opinion by Justice Thomas—struck down New York's law. This holding will have an immediate and significant impact on the roughly eighty million people living in states with "may issue" laws like New York's,[15] even as it allows them to adopt "shall issue" laws.[16] Almost immediately after *Bruen* was issued, New York moved swiftly to amend its laws to remove the discretionary feature the Court struck down, require new application submissions, and restrict the locations where permitholders may bring their guns.[17] These new regulations have already been challenged on Second Amendment grounds and temporarily restrained in part, although an appeal is now pending before the Second Circuit.[18]

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11. William J. Krouse, Cong. Res. Serv., Gun Control: Concealed Carry Legislation in the 115th Congress (Jan. 30, 2018), *available at* https://sgp.fas.org/crs/misc/IN10852.pdf.

12. Amy Sherman, "More States Remove Permit Requirement to Carry a Concealed Gun," *Politico* (Apr. 22, 2022), https://www.politifact.com/article/2022/apr/12/more-states-remove-permit-requirement-carry-concea/.

13. E.g., David Jost, Ohio Attorney General, "Ohio's Permitless Carry Law Goes into Effect Today: Here's What You Should Know," Press Release, June 13, 2022, https://www.ohioattorneygeneral.gov/Media/News-Releases/June-2022/Ohio%E2%80%99s-Permitless-Carry-Law-Goes-into-Effect-Today.

14. New York State Rifle & Pistol Association v. Bruen, 142 U.S. 2111 (2022).

15. Adam Liptak, "Supreme Court Strikes Down New York Law Limiting Guns in Public," *New York Times* (June 23, 2022), https://www.nytimes.com/2022/06/23/us/supreme-court-ny-open-carry-gun-law.html.

16. See *Bruen*, 142 U.S. at 2138 n.9 (noting that "nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' 'shall-issue' licensing regimes"); and Ibid. at 2162 (Kavanaugh, J., concurring) (underscoring that "shall-issue licensing regimes are constitutionally permissible").

17. S.B. S51001, 2021–2022 Leg. Sess., Extraordinary Sess. (N.Y. 2022), *available at* https://legislation.nysenate.gov/pdf/bills/2021/S51001.

18. See Antonyuk v. Hochul, No. 1:22-CV-0986, 2022 WL 5239895 (N.D.N.Y. Oct. 6, 2022), *appeal docketed*, No. 22–2379 (2d Cir. Oct. 7, 2022).

Bruen, like *Heller* before it, has the potential to thoroughly reshape the balance between gun politics and judge-enforced law. The opinion opens by holding that the right to keep and bear arms extends outside the home, a proposition lower courts had overwhelmingly held or assumed to be true, and which the parties did not contest.[19] That holding, in and of itself, thus did not disrupt much existing doctrine. But, in setting rules to determine which gun laws are consistent with a right to keep and bear arms outside the home, *Bruen* announced a new, highly originalist approach to Second Amendment doctrine under which *all* of the answers must seemingly be tied to constitutional text and history—and not, for example, whether a challenged law is effective in achieving important goals.[20]

There are significant difficulties with the Court's application of this historical approach, as the dissent and many commentators have pointed out.[21] But perhaps *Bruen*'s most egregious problem—the one that will have the most long-lasting effects—is its seeming rejection of the *relevance* of contemporary evidence regarding gun policy. In declaring that the Second Amendment cannot be subject to means-ends scrutiny, and adopting a test that appears to evaluate the constitutionality of gun laws based solely on whether they are "consistent with historical tradition," the majority's test seems to give the right to keep and bear arms a greater degree of insulation from modern regulatory demands than, for example, the First Amendment's freedom of speech or free exercise of religion.[22]

This approach is normatively dubious because many questions of gun regulation turn on context and community standards, which counsels that any constitutional test must leave some room for elected politicians to tailor gun laws to local

19. *Bruen*, 142 U.S. at 2122.

20. Ibid. at 2126 (internal citation omitted); see also Ibid. at 2129–30 (internal citation omitted).

21. See, e.g., Isaac Chotiner, "The Historical Cherry-Picking at the Heart of the Supreme Court's Gun-Rights Expansion," *New Yorker* (June 23, 2022) (interviewing Adam Winkler); Saul Cornell, "Cherry-Picked History and Ideology-Driven Outcomes: *Bruen*'s Originalist Distortions," *SCOTUSblog* (June 27, 2022), https://www.scotusblog.com/2022/06/a-minor-impact-on-gun-laws-but-a-potentially-momentous-shift-in-constitutional-method/; and George F. Will, "The Supreme Court's Gun Ruling Is a Serious Misfire," *Washington Post* (June 23, 2022), https://www.washingtonpost.com/opinions/2022/06/23/supreme-court-gun-ruling-misfire/, "there is an American tradition even older than the nation of striking a 'delicate balance between the Second Amendment's twin concerns for self-defense and public safety,'" quoting amicus brief filed in *Bruen* by former federal appellate judge J. Michael Luttig and others supporting the constitutionality of New York's law on originalist grounds.

22. Kennedy v. Bremerton Sch. Dist., 142 U.S. 2407 (2022) (applying tiers of scrutiny analysis to Free Speech and Free Exercise claims made by a high school football coach who sought to pray at midfield after games).

conditions based on popular opinion.[23] For example, the political calculus of how to weigh gun rights and regulation is often vastly different in rural and urban areas.[24]

At first blush, *Bruen* appears to be a rejection of gun politics—or, at best, a doctrinal adoption of an absolutist opposition to gun regulation that, while present, remains a fringe position.[25] We do not think that the opinion goes quite that far, though it does make the role of gun policy—filtered through politics—more obscure and difficult. What *Bruen*'s test will ultimately require in practice is a series of historical analogies—comparisons between historical and modern gun laws. And that, in turn, will mean identifying relevant similarities between those two categories.

But the Court's own application of this test does not appear even-handed. It demands tight analogies to *support* modern gun laws, but loosens the standard—and permits more contemporary evidence—when calling those laws into question. Rather than ask whether there was a historical tradition of restricting public carry for safety reasons (which even the majority would likely have to concede there is), the Court asked whether there were historical laws "limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense."[26] This approach suggests that the analogy must be a close one: two statutes that burden the right to carry or possess guns by making the carrier or possessor do a similar thing at a similar point in time.

The same tight analogy is apparently *not* required when considering claims that broaden the category of "Arms" protected by the Second Amendment. This is the fundamental asymmetry of *Bruen*'s historical-categorical approach. Legislative justifications are only valid when rooted in tradition, but the list of guns protected by the Second Amendment can expand (and, potentially, contract) free of historical constraints. This is most evident in the majority's quick acceptance that the Second Amendment presumptively extends to modern weapons: "We have already recognized in *Heller* at least one way in which the Second Amendment's historically fixed meaning applies to new circumstances: Its reference to 'arms' does not apply 'only [to] those arms in existence in the 18th century.'"[27] This is because, "even though

23. Indeed, the Court itself emphasized this principle the day after *Bruen* was decided, in the course of overturning Roe v. Wade, 410 U.S. 113 (1973). See Dobbs v. Jackson Women's Health Organization, 142 U.S. 2228, 2279 (2022).

24. See Blocher, "Firearm Localism," no. 4, 102–03.

25. Katherine Schaeffer, "Key Facts About Americans and Guns," *Pew Research Center*, September 13, 2021, https://www.pewresearch.org/fact-tank/2021/09/13/key-facts-about-americans-and-guns/ (reporting that most Americans want gun laws to be stricter, and only 14% want them to be less strict).

26. *Bruen*, 142 U.S. at 2138.

27. Ibid. at 2132 (internal citations omitted).

the Second Amendment's definition of 'arms' is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense."[28] This principle—whether an instrument "facilitate[s] armed self-defense"—is far more flexible than the demanding analogical test described above. The symmetric principle of similarity, one would think, should be that the Second Amendment allows modern gun laws that "facilitate public safety."

Pre-*Bruen*, the legal framework for Second Amendment challenges considered popular opinion and consumer choice for the "in common use" inquiry. The scope of the amendment's protection turned on consumer popularity. Individuals often "use the market as an arena for politics in order to change institutional or market practices."[29] Choosing to purchase a certain type of firearm can constitute political consumerism. For example, there is perhaps no clearer link between a purchase and political speech than when an individual buys a gun that they are concerned will be banned by the government, or buys a gun to take to a political march or protest.[30] Determining the scope of constitutional protection through consumer choices validates such politically motivated behavior.[31] *Bruen* re-affirmed *Heller*'s much-criticized[32] rule that the Second Amendment's scope extends to weapons "in common use at the time"[33]—a rule that requires courts to consider current statistical data regarding gun ownership.[34]

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28. Ibid.

29. Dietlind Stolle and Michele Micheletti, *Political Consumerism: Global Responsibility in Action* (Cambridge, UK: Cambridge University Press, 2013); Lauren Copeland and Shelley Boulianne, "Political consumerism: A meta-analysis," *International Political Science Review* 43 (2022): 3–18; and Kyle Endres and Costas Panagopoulos. "Boycotts, buycotts, and political consumerism in America." *Research & Politics* 4 (2017): 1–9.

30. See Greg Sargent, "Surging AR-15 Sales in Georgia Reveal the Gun Industry's Dark Side," *Washington Post* (June 6, 2022), https://www.washingtonpost.com/opinions/2022/06/06/surging-assault-weapon-sales-georgia-gun-industry/ (noting that gun sales tend to spike when government actions suggest that certain guns might be banned in the future); see also Joseph Blocher and Reva B. Siegel, "When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation After *Heller*," *Northwestern University Law Review* 116 (2021): 155–56.

31. Interestingly, these statistics seem to go only one way. Few, if any, court decisions to apply the "in common use" test have considered that the decision *not* to purchase weapons may represent more than mere apathy and, instead, a conscious political statement. See, e.g., Joseph Blocher, "The Right Not to Keep or Bear Arms," *Stanford Law Review* 64 (2012): 154.

32. See, e.g., Enrique Schaerer, "What the *Heller*?: An Originalist Critique of Justice Scalia's Second Amendment Jurisprudence," *University of Cincinnati Law Review* 82 (2018): 813–21.

33. *Heller*, 554 U.S. at 570, 627 (2008) (quoting United States v. Miller, 307 U.S. 174, 179 (1939)); and *Bruen*, 142 U.S. at 2143.

34. See, e.g., Hollis v. Lynch, 827 F.3d 436, 449 (5th Cir. 2016), referencing a judicial "consensus that 'common use is an objective and largely statistical inquiry,'" quoting New York State Rifle & Pistol Association v. Cuomo, 804 F.3d 242, 256 (2d Cir. 2015).

After *Bruen*, however, the views of the people about why certain gun regulations are justified, filtered through their elected representatives, will no longer play an independent role in the legal analysis of gun regulations.[35] *Bruen* says that the modern *strength* of these opinions is irrelevant—no matter how strongly the people in a jurisdiction may believe certain interventions beneficial or necessary, those interventions are unconstitutional if they infringe on the Second Amendment and lack historical analogues that were justified on similar grounds.[36] But *Bruen still* permits—indeed, requires—courts to consider popular opinion in the form of consumer choice among different types of guns to determine whether those guns are protected by the Second Amendment. Notably, the Court has not articulated a threshold at which guns are considered "in common use." It could be that guns owned by a small minority (at a high per-owner level) are protected, even if they are relatively *unpopular* when viewed across the entire adult American populace.[37]

Bruen's novel brand of originalism is sure to spark much debate among legal scholars, political scientists, and historians. One particular area where the holding is subject to criticism is in its lopsided approach to accounting for modern public opinion and consumer choice.

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35. E.g., James Madison, *The Federalist No. 10*, ed. Clinton Rossiter, (New American Library, 1961), 82.

36. *Bruen* suggests that the popular adoption of gun laws may have some bearing on constitutionality—for example, by noting that New York was one of only a small minority of "may issue" jurisdictions. But the historical-analogue test that it expounds ultimately appears impervious to even tremendously popular laws lacking historical support.

37. For example, the 2021 National Firearms Survey indicates that "about 24.6 million people, have owned an AR-15 or similarly styled rifle, and up to 44 million such rifles have been owned," across an adult American population of approximately 260 million; William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned*, last revised September 13, 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4109494.

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